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COLUMBIA LAW REVIEW.

VOL. X. JANUARY, 1910. No. 1

SOME PHASES OF THE LAW OF MASTER AND SERVANT: AN ATTEMPT AT RATIONALIZATION.

Mr. Labatt in the preface to his valuable work on Master and Servant says that this is "a subject which may, without any exaggeration, be said to enjoy the unenviable distinction of having been the occasion of a larger number of conflicting doctrines and inconsistent decisions than any other branch of the law." Reflection upon the matter induces the conclusion that this inharmony probably results from the fact that the courts have been attempting to follow certain doctrinal formulas with too insular a view, neglecting the reasons underlying the rules. There is a potentiality in reasons; and mere satisfaction of curiosity is not the only efficacy that should attach to their discovery.

The present article proposes a discussion of the logic and juridical concepts underlying some of the principles generally recognized as applicable to suits by servants against their masters for personal injuries,[1] rather than a display of the specific results reached by the various courts in the practical application of the principles.

THE NATURE OF THE SERVANT'S ACTION.

Analyze an ordinary typical action by a servant against his master for injuries received in the course of the employment, and it will be found to be in form and substance an action *ex delicto,* in which the tort consists in an injury to the servant resulting from a violation by the master of a duty owed by him to the servant by reason of the relationship arising from the contract of

[1]Of course, only a few of the many doctrines known to this branch of jurisprudence can be noticed in the limited space here available; and those noticed cannot be treated exhaustively.

employment. While, in general, breaches of contracts give rise only to actions *ex contractu,* yet relationships arising from contracts usually present juridical predicaments from which actions *ex delicto* may also spring, as the result of the violation of the duties imposed by the relationships.[2]

In this connection it may be profitable to advert to the proposition that in the development of common law remedies the notion of redressing breaches of such informal contracts as would not support an action of debt, asserted itself first in connection with a form of action which is essentially *ex delicto*—trespass on the case. Before the action of assumpsit was developed the common law courts saw in the breach of a contract a misfeasance partaking so much of the notion of that which we now call a tort as to support an action of trespass on the case.[3] In such cases the terms of the contract naturally controlled the question as to whether the thing omitted or done by the defendant was an actionable wrong. Remedial law has so developed that breaches of duty arising from private contractual relationship are now usually redressible in some form of action *ex contractu.* However, in that formative period when the juridical notion of the different forms of actions was taking on definite shape the courts were not called upon to consider the case of a servant physically injured through the failure of his master to perform the duties growing out of the relationship existing between them—the times did not afford the conditions from which such actions usually spring. When a change took place in the prevailing state of affairs and such actions began to arise, there was no form of action *ex contractu* which seemed particularly applicable; and the *ex delicto* form of action was naturally adopted. The master's breach of duty (though the relationship from which the duty arose was private and contractual) was viewed as a tort; nevertheless, in the early cases the underlying contract was not lost sight of in determining the extent of the duty and in defining the nature of the tort.[4]

The servant's suit in such cases may be placed under the common law action of trespass on the case as developed under the

[2]Cf. Burdick, Torts (2 ed.) 8-10.

[3]Spence, Equitable Jurisd. of the Courts of Chan. 242 *et seq.;* Anson, Law of Contracts (8 ed.) *46, 53.

[4]In the earliest master and servant cases, Priestley *v.* Fowler (1837) 7 L. J. C. L. (N. S.) 42; Murray *v.* S. C. R. R. Co. (S. C. 1841) 1 McMullan 385; Farwell *v.* Boston R. Corp. (Mass. 1842) 4 Metc. 49, the dominance of the contractual implications, as determining the reciprocal duties and liabilities of the parties, is given full recognition. It seems to have been sometimes overlooked in subsequent cases.

authority of the Statute of 13 Edw. I, called the Statute of Westminister the Second, which, however, if the statement of Lord Coke himself is to be trusted, was merely a declaratory enactment. This is referred to for the purpose of adverting to the proposition sometimes, though not frequently disputed, that, although the earliest master and servant cases are of but comparatively recent announcement, the general principles which, in the absence of statute, the courts of England and America apply to such cases, are common law principles.[5] Attention to this fact becomes important whenever a court of one State is called upon to try an action against a master for an injury received by the servant in another State and the law of the latter State is not shown; and especially is it important to keep it in mind if it appear that the law in the latter State has not been modified by statute and the courts of the former assert the right, as many courts do, of following their own decisions as to common-law principles, notwithstanding that the courts of the State where the cause of action arose have taken a different view.

THE DOMINANCE OF THE CONTRACT AND ITS IMPLICATIONS IN FIXING THE *Prima Facie* DUTIES AND LIABILITIES.

When a tort springs from a contractual relationship, the extent of the resulting duties and consequently the *ex delicto* liability of the parties are modified and largely controlled not only by the express terms of the agreement, but also, and chiefly, by the implied terms. This is a broad, general principle of jurisprudence.[6]

The contract out of which the relation of master and servant arises is usually simple on its face; the express terms, so far as material to the ordinary case, are merely that the servant shall work at the designated labor at prescribed wages, and that the master shall pay the sum named in compensation. But, generally

[5] "The decisions upon the subject are of recent date, but the law cannot be considered to be so. The principles upon which these decisions depend must have been lying deep in the system ready to be applied when the occasion called them forth." *Per* the Lord Chancellor in Barton's Hill Coal Co. *v.* M'Guire, (1858) 4 Jur. (N. S.) 772, 773.

"The law must have been the same long before it was enunciated in this court in Priestley *v.* Fowler." *Per* Pollock C. B. in Vose *v.* Lancashire etc., R. Co. (1858) 2 Hurls. & N. 728, 734.

[6] Take for example an action *ex delicto* against a carrier for loss of goods. The degree of diligence, the extent of the liability, etc., are (in the absence of statute) governed by the stipulations of the bill of lading. The plaintiff may make a *prima facie* case by showing the relationship and the loss; but whenever the specific contract appears, either as an affirmative defense or otherwise, its terms, so far as legal, dominate the action. The same is true as to actions against telegraph companies, bailees, etc.

speaking, the express terms of a contract are only the skeleton around which the real body of the contract is built; the flesh and blood, the nerves and tissues, consist of implications which the law finds as being understood, but not directly said, by the parties.[7] These connotations or implications which the law finds and enforces in all contracts are determined by the nature of the transaction which the parties have in contemplation; and when legitimately indulged they give effect only to what the parties are fairly supposed to have intended. The customs of ordinary men, in similar dealings, taken in connection with the law of the land, are the premises from which the courts draw their conclusions as to what implications are to be found in any contract.

The contract of employment is no exception. The express terms are simple; the implications, manifold. What then are the principal and usual connotations or implications running with every ordinary contract of employment?

The Community of Interest in a Contract of Employment.

Looking to the transaction taking place between a prospective master and a prospective servant, it is to be seen that the subject-matter of the proposed contract is mutual; theoretically, at least, it is to their common benefit. The business of having the work done is the master's, the business of doing the work is the servant's. In a sense, therefore, each has a proprietorship in the *res* of the contract—the work. This should be kept in mind; it is a principle which the courts have often applied, sometimes consciously, but more often unconsciously.[8]

[7] A carrier sells a ticket, agreeing merely to convey the passenger from Station A to Station B. This is the skeleton upon which the law builds a thousand other agreements by implication. The safe and comfortable coach, the maintenance of the schedule, the guardianship and protective escort of an adequate number of trainmen, the respectful treatment, the safe approaches and exits, the necessary water, light and heat, the extraordinary care and diligence and all those things which the law recognizes as being due from the carrier to the passenger are not mentioned—they are implications only; but they are the very body and vitals of the contract.

[8] One investigating the subject is struck by the frequency with which judges dealing with master and servant cases have reached the right result, and in doing so have given reasons wholly illogical and sometimes almost absurd. It would seem that an intuition of which they were unaware guided them. As Justice Bleckley said in Lee *v.* Porter (1879) 63 Ga. 345, 346: "The human mind is so constituted that in many instances it finds the truth when wholly unable to find the way that leads to it.

> 'The pupil of impulse, it forc'd him along,
> His conduct still right, with his argument wrong;
> Still aiming at honor, yet fearing to roam,
> The coachman was tipsy, the chariot drove home.'"

Implication as to the Place of Work.

The simple terms of the agreement having been closed, one of the first things to suggest itself is that there must be a place of work. Keeping in mind the ordinary course of men as to such things, it is natural to conclude that the parties to the contract intended, and that the contract therefore implies, that the master shall furnish the place of work. The servant must, in order to perform the duties, go into or upon the premises of the master (or provided by the master); and when he goes, he is there, "on lawful business, in the course of fulfilling a contract, in which both * * * [parties] have an interest, and not upon bare permission." One so upon the premises of another is usually referred to as an invited person, and is entitled by the clearest principles of common law to assert certain well recognized rights.[9] Ordinarily, the proprietor of the premises owes to all such persons the duty of seeing that the place shall be kept in "a reasonably safe condition so far as the exercise of reasonable care and skill can make it so."[10] Therefore the particular principle that the master owes to his servant the duty of using ordinary care in keeping the place of work reasonably safe is but a phase of the general doctrine which imposes the like duty upon every landowner as to invited persons.

The Implication as to Instrumentalities.

It is a reasonable implication from the contract that the master will furnish the tools, machinery and other instrumentalities, animate and inanimate, by which the work is to be done.[11] What implication is there as to the quality? Nothing to the contrary appearing, it is fair to assume that the contracting parties had in mind the kind in general use by those carrying on the particular vocation; and it is further fair to assume that they contemplated that the master would select and maintain the instrumentalities according to the customary methods of men of ordinary prudence engaged in the same business. Hence, the general proposition fol-

[9]The quotation is taken from a leading case on the rights of invited persons, Indermaur *v.* Dames (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311. It is true that in that case the court suggests, but does not decide, that a servant stands on a somewhat different footing, on the ground that he has bargained for the risk. The present discussion has not reached the point which involves the assumptions of the servant; hence, that element of the case may temporarily be disregarded.

[10]Pollock, Torts (8 ed.) 508, citing Francis *v.* Cockrell (1870) 5 Ex. Ch. L. R. Q. B. 501, 513. Burdick, Torts (2 ed.) 455-6.

[11]"It is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business." *Per* Harlan, J. in Hough *v.* Railway Co. (1879) 100 U. S. 213, 217.

lows in such cases, that the master is obligated to use ordinary care to select and maintain the instrumentalities, animate and inanimate, by which the work is to be done, and to see that they are equal in kind to those in general use. Thus, the implication of the contract appears as the source of the duty.

But interpolate a new circumstance into the transaction. Suppose it appears that the servant at the time he contracted knew, or had reasonable opportunity to know that the instrumentalities did not in fact come up to the standard which *prima facie* would have been required of the master, is it fair to construe the contract as requiring the master to furnish standard instrumentalities or as requiring only the furnishing of those which both parties knew and saw that he had? The latter, of course; for it is a familiar principle that contracts, when they are silent as to a matter, are to be construed according to the surrounding circumstances known to both parties. In this case, therefore, the agreement implied against the master calls for less than the ordinary, and the duty imposed upon him by the relationship arising from the contract is accordingly narrowed. If a servant is injured by reason of a defect which he knew existed in an instrumentality at the time he undertook to work with it, he has no cause of action for the immediate and direct reason that the contract between him and the master did not impose upon the latter, as an incident of the relationship, the ordinary duty of furnishing him an undefective instrumentality. In such cases the servant's action fails for this primary cause, and there is no need to resort to any of those doctrines which relate to affirmative defenses.[12]

ASSUMPTION OF RISK, A CONTRACTUAL PREDICAMENT.

Risk is the inevitable concomitant of every human activity. The carrying on of work necessarily has its hazards. Risk connotes injury and damage. Therefore, these are things which the contract of employment necessarily respects or anticipates, though they are not explicitly referred to. The very nature of the *res* of the contract makes it necessary for one party or the other to contractually undertake this risk, (that is to say, to assume it), or for one of them to assume a part of it and the other to assume the remainder. Assumption of risk, as the term is employed in this branch of jurisprudence, is therefore essentially a contractual

[12]"A master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do." *Per* Lord Cairns, in Wilson *v.* Merry (1868) 19 L. T. (N. S.) 30, 33.

predicament. The master's liability, since the action is *ex delicto,* is predicable only of broken duty; hence, he assumes none of the risk, (that is, pecuniary liability to compensate for the injury resulting from the risk), except when the injury results from a violation of duty; and his duties, as has been seen, are, for the most part, defined by the contract. Therefore, if the servant, seeing the condition of the instrumentalities and being aware that they are not first class, contracts for the employment, without taking any warranty from the master but, to the contrary, leaves the transaction open to the implication that the master is obligated only to furnish the instrumentalities as they are seen and known to be, ordinary contractual construction leads to the conclusion that the servant has assumed the risk of injury from the patent defects.[13]

We may approach the subject from a slightly different point of view and the same result will appear. Let us conceive of a workman unemployed and having the option of working for himself or of working for a master. In either event, he must have the necessary tools, machines and other instrumentalities. If he decides to work for himself he either buys or rents the necessary implements. In the one case the means by which he obtains them is a contract of sale, in the other a contract of renting or hiring. Say he buys them and nothing is said as to defects; the law implies certain warranties; they are to be free from hidden defects, so far as the seller knows or reasonably should know, and so far as he, the buyer, does not know and is reasonably excused from not discovering. If he is injured as the result of using implements so acquired, the question whether he has a cause of action against the seller depends on whether the injury arose through a defect of which the seller had actual or constructive knowledge and of which he himself was actually and constructively ignorant.[14]

Now let us suppose that he rents the instrumentalities. The law implies that the person from whom he thus acquires them makes him a similar warranty to that of the seller in the case just mentioned. If he is hurt by reason of defects in the hired instru-

[13]That the early cases regarded assumption of risk as a purely contractual predicament, see Murray *v.* S. C. R. R. Co. (S. C. 1841) 1 McMullan 385; Farwell *v.* Boston R. Corp. (Mass. 1842) 4 Metc. 49.

[14]Dushane *v.* Benedict (1887) 120 U. S. 630. It may be noted that most of the reported cases in which a cause of action of this nature is asserted are cases in which the purchaser seeks to set off the damages resulting from the injury by way of recoupment to an action by the seller for the purchase price; but the principle in these cases is not different from what it would be if brought directly.

mentalities, the question whether he has a cause of action against the person furnishing them, depends on whether the injury arose through a defect of which the owner was actually or constructively aware, and of which he himself was actually and constructively unaware.[15]

Likewise, if the person in question instead of procuring the instrumentalities by a contract of purchase or hiring, obtains them by virtue of a contract creating the relationship of master and servant, the liability of the master so furnishing them is governed by the same general rule applied in the respective cases where the other contracts were involved. The servant is at liberty to accept from his master tools below the ordinary standard, but he accepts them on the same conditions, as to assumption of risk, as if he had bought them or had hired them. The common law principle of *caveat emptor* is the parent principle controlling the three cases,[16] and (to continue the figure) as to the furnishing of instrumentalities, the master's liability, the seller's liability, and the liability of him who hires them out, are blood relatives of close degree.

THE EFFECT OF STATUTE ON THE CONTRACTUAL IMPLICATIONS.

The reciprocal assumptions, responsibilities, liabilities and duties of the master and the servant, dependent so largely as they are upon underlying contract, respond instantly to the introduction of any new element affecting the agreement. The law of the land is a part of every contract; and when a term, express or implied, conflicts with the requirement of the law, it is a rule of construction that the latter controls. Now, the State has an interest in the lives and physical safety of its citizens; hence, it is competent for the legislature to make unlawful the furnishing of defective instrumentalities, either generally or in certain special occupations. When such a statute exists, the courts, wherever it is applicable, read it into the contract of employment. There is, thenceforth, no room for the inference that instrumentalities below the standard prescribed by the statute were in contemplation of the parties. Hence, it was early declared by an English court, as a common law proposition, (now generally recognized) that the servant's

[15]Copeland *v.* Draper (1893) 157 Mass. 558, 19 L. R. A. 283, note. This case is cited by Dallas, J. in Garnett *v.* Phœnix Bridge Co. (1899) 98 Fed. 192, 194, in support of the proposition that the master's liability in furnishing a tool to his servant is similar to what it would be if he rented it to him or sold it to him.

[16]"But the common law in general applies the principle of *caveat emptor* when the hirer has examined the article." Holmes, J. in Copeland *v.* Draper, *supra.*

knowledge does not lessen the master's duty to observe the statute.[17]

ASSUMPTION OF RISK, AS AFFECTED BY PROMISE TO REPAIR OR BY ASSURANCE OF SAFETY.

Again: The servant may see the defect and yet be unwilling to assume the risk resulting therefrom. He need not assume it; he may contract otherwise. The agreement that he shall not assume it may be express or may arise by implication from what is said and promised on the subject. So, if the defect is mentioned and the master promises to remedy it, the basis for inferring an assumption of the risk by the servant is gone; and the law so construes the contract. Hence, the doctrine is that complaint by the servant and promise to repair by the master prevents the latter from defending on the ground that the former has assumed the risk.[18]

Suppose that in the case just mentioned the servant asserts that the appliance appears to be defective and the master, in order to induce the contract (or, as shall be seen later, a continuation of the work,) says, "It is safe," or words to that effect. This, it will be seen, is an express warranty on the master's part. The rule applicable between seller and buyer[19] is again the rule to be applied between master and servant. In the face of the protest and the express warranty it would violate every canon of construction to say that the servant agrees to assume the risk.[20]

To say that the servant in this class of cases does not assume the risk is not equivalent to saying that the master becomes an

[17]"In the case of a statutory duty * * * even the knowledge and reluctant submission of the servant who has sustained an injury, are held to be only elements to determine whether there has been contributory negligence." *Per* Willes, J. in Indermaur *v.* Dames (1866) L. R. 1 C. P. 274, 286.

[18]Holmes *v.* Clark (1862) 31 L. J. C. L. (N. S.) 356; Hough *v.* Railway Co. (1879) 100 U. S. 213, 217.

[19]See Tyler *v.* Moody (1901) 111 Ky. 191.

[20]It would be utterly illogical to say, as some courts have said, that since he knew the risk and comprehended it he is conclusively bound to have assumed it. "Volens, not sciens, is the test." Dempsey *v.* Sawyer (1901) 95 Me. 295, 298. Of course, in some cases it may not be a mere matter of judgment as to whether the instrumentality is defective or not; the defect and danger may be obvious, and the doctrine of *volenti non fit injuria* or of contributory negligence may apply; but in ordinary cases when the master has warranted safety, the defense of assumption of risk is not logically open.

Especially in those States where a comparison of the respective negligence of the parties and an apportionment of the damages is allowed, it is important to keep closely in mind the distinction between the two defenses, assumption of risk and contributory negligence; to sustain the one would defeat the whole action, to sustain the other might result only in a diminution of the damages.

insurer of the servant's personal safety. Even so fair and thorough a commentator as Mr. Labatt has seemed to overlook this distinction; he criticizes certain Missouri cases which hold that an assurance from the master that the machinery or apparatus is all right, coupled with a direction to use it, notwithstanding the servant's complaint as to its sufficiency, amounts to a guaranty of safety; he says this is in conflict with the principle that the legal standard of the master's duty is "that he shall use due and reasonable diligence in providing safe and sound machinery * * * so as to make it reasonably probable that injury will not occur," and in conflict with the same proposition, stated in the negative form, that "the master is not an insurer or guarantor, or warrantor of the safety of his servants." [21] *Non constat.* In the contractual phase of the matter, the master is a warrantor that the machine is safe and the servant stands as having declined to assume the risk of an injury from it; but when the matter is presented *ex delicto,* as it is in a suit by the servant for personal injuries received through the machine's proving unsafe, the action is not based on the master's breach of warranty.[22] To hold the master *ex delicto,* notwithstanding the warranty, the servant must show that he has been guilty of a tort, has violated that prime duty which is the basis of negligence—"the duty of fellow-citizens to observe in varying circumstances an appropriate measure of prudence to avoid causing harm to one another." [23] The making of the warranty merely brings the liability of the master up to the normal, as tested by the engagement that he will not imprudently expose the servant to the hazard of losing life or of suffering great bodily harm;[24] its chief effect on the cause of action is to remove from the servant the implication that he has assumed the risk.[25]

[21]Labatt, Master and Servant § 451, citing § 24.

[22]Yarmouth *v.* France (1887) L. R. 19 Q. B. D. 647.

[23]Pollock, Torts (8 ed.) 22.

[24]"If they [corporations, as employers] are not insurers of the lives and limbs of their employees, they do impliedly engage that they will not expose them to the hazard of losing their lives, or suffering great bodily harm, when it is neither reasonable nor necessary to do so." Railroad Co. *v.* Fort (1873) 17 Wall. 553, 559.

[25]In actual practice the question is usually more complex; for the assurance or warranty of the master must be considered in connection with a number of other elements as disclosed in the particular cases, but here omitted in the effort to dissect out and display nakedly the particular fundamentals under discussion. On the question of negligence or contributory negligence the fact of the warranty of assurance is an evidentiary but not a controlling factor, as it is touching the purely contractual matter of assumption of risk. The facts involved in the case of Bush *v.* West Co. (1907) 2 Ga. App. 295, 58 S. E. 529 make it a fairly illustrative case as to this point.

It seems needless to say that mere protest on the part of the servant without any promise or assurance on the part of the master does not relieve the former of the implication of an assumption of the risk, when he, despite his protest and failure to exact a promise or warranty from the master, goes on with the work.[26]

INFANTS, AND OTHERS NOT *Sui Juris.*

How about the case of a minor, a person without the capacity to contract? Wood's statement that "when either of the parties entering into a contract for services is laboring under any legal disability, as infants, idiots, lunatics and married women, the contract cannot be enforced, and the relation of master and servant in its full sense does not exist," [27] seems perfectly sound. As this writer further says, [28] such an attempted contract creates only a *de facto* relation. It would seem to follow, therefore, that the rights and liabilities of the parties should be determined by other considerations than those which obtain where a valid contract underlies the relationship. Yet the books are full of decisions in which the infant is said to have assumed the risk.

One court, indeed, has attempted to rationalize its position in holding that the minor assumes the risk. Mr. Beach in his work on Contributory Negligence has said:

"If this rule [assumption of risk] has any substantial basis, it is the basis of an implied contract. Upon no other ground yet suggested is it for an instant tenable. Inasmuch as minors are not bound by their express contracts with their employers, having in legal contemplation no power to make a contract, it is not plain upon what theory this rule can in justice be held to apply to them. If the policy of the law refuses to bind a minor by his own deliberate express contract to his employer, much more, it is submitted, should the policy of the law refuse to fix upon an employee of tender years so onerous and artificial an implied contract as this." [29]

The Supreme Court of Alabama[30] cites this statement of Mr. Beach and criticises it as follows:

"But minors' contracts are not void. They are voidable merely, and we think a plaintiff, whether the minor himself or another, by suing for an injury caused by some specific negligence committed in the course of the business, apart from the fact of employment itself, necessarily adopts for the purposes of the action, the minor's

[26] Assop *v.* Yates (1858) 2 Hurlst. & N. 768.
[27] Wood, Master and Servant § 5.
[28] *Ibid.* § 6.
[29] § 357.
[30] Harris *v.* McNamara (1892) 97 Ala. 181, 183.

voidable contract of employment, and subjects himself to the same rules which govern in actions by or in right of adult employees." [31]

Is the statement of the Alabama court in regard to the effect to be given to the minor's contract, sound in principle? Is it not contrary to the spirit of the common-law rule that you cannot predicate duty of an infant's contract, so as to charge him *ex delicto,* when he would not be bound in an action *ex contractu?* [32]

The infant's suit against the master is not an action upon the contract, and is not necessarily based upon it. The true theory would seem to be that ordinarily the action of the infant for personal injuries received during an employment is not a case arising from the contractual relation of master and servant but from the *de facto* relation resulting from the fact that the infant was actually working for the defendant. To borrow terminology from Mr. Burdick,[33] he sues for the violation of his right *in rem,* not for a violation of a right *in personam.* The law should test the question of the defendant's negligence and should fix the extent of the defendant's responsibility not with regard to the terms, express or implied, of any contract, but solely with regard to the nature of the duty arising against every one who induces or invites an infant to come upon his premises and who allows, or orders him to work with or come within range of machinery.[34] In such a case, if it

[31]The court adds, however, that "original, wrongful employment of a minor in a dangerous service, furnishes, under proper allegations, a different and independent cause of action." Cf. Platt *v.* Southern Photo. Co. (1908) 4 Ga. App. 159, 60 S. E. 1068.

[32]See Jennings *v.* Rundall (1799) 8 T. R. 335, 4 Rev. Rep. 680, citing Johnson *v.* Pie (1677) 1 Keb. 905, 1 Lev. 169. (In the Jennings case the alleged tort of the infant was that he had hired a horse to be ridden moderately and had ridden it immoderately. Judgment for defendant.) The same rule applied at common law to married women. Cooper *v.* Witham (1680) 1 Lev. 247, 1 Siderfin 375; Fairhurst *v.* Liverpool Asso. (1854) 9 Exch. 422.

[33]Burdick, Torts (2 ed.) 6-10.

[34]It may be observed that the liability of the master to a servant *sui juris,* would rest upon this broad and general basis of duty, were it not for the fact that the allegation and proof of the relationship itself disclose the existence of an underlying express or implied contract which should, and does limit the duties of the relationship. Corroborative of this theory is the fact that if in a given case it is issuable whether the servant's presence upon the master's premises at the time of the injury was by reason of his relationship as a servant or by reason of some other business, this issue of fact must first be decided before it can be said whether the duty of the defendant is to be determined by the contract of employment or by the more general rule of negligence as ordinarily applicable between fellow citizens. One of the earliest, if not the earliest of the master and servant decisions of the United States Supreme Court, Northwestern Union Packet Co. *v.* McCue (1873) 17 Wall. 508, turned on this point. Compare also Seaboard Line Ry. Co. *v.* Chapman (1908) 4 Ga. App. 706, 62 S. E. 448, in which it was held that if an engineer in North Carolina came upon

appeared that the infant was hurt as the result of a danger which was open, patent and fully comprehensible by him, his action would not fail, because he had assumed the risk, or because of anything else growing out of any contract of employment, but because the circumstances were not sufficient to beget a duty against the employer.[35] Except where statute or the tender age of the infant makes it so, it is not usually wrongful in the popular sense of the word, nor negligent in the legal sense, for a person to allow a minor to come upon his premises and to work at his machines, provided he is not exposed to abnormal dangers or to those beyond his power to comprehend and to avoid by the exercise of that care which a person of his age and development is normally expected to be capable of exercising for his own safety.[36]

So far as the present writer's investigations have disclosed there is no reported case dealing with the question as to how the duties and liabilities of the parties are to be measured where the servant was, at the time of contracting, an insane person or a married woman subject to common law contractual disabilities. It is submitted, however, that upon reason and justice the rule outlined as to minors should, in the main, apply to others not *sui juris*.[37]

Extraordinary Assumption of Risk by Inspectors and Repairers.

In some cases, as has been seen, the defense of assumption of risk is either absent or less available than ordinarily; on the other hand there are cases in which the servant's assumption includes risks which the master would be usually expected to

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the premises of the railway company for the purpose of taking charge of an engine while he was intoxicated, in violation of a statute of that State, prohibiting intoxicated persons from handling locomotives, the duty of the railroad company was not to be determined by the rules applicable to cases of master and servant.

[35]As will be seen later, the defenses of *volenti non fit injuria* and of the infant's contributory negligence may be open to the master. In many cases the result may be the same, but it is far more just, as well as logical, to rest the master's exemption from liability on these grounds rather than on any such contractual ground as assumption of risk.

[36]It is not pretended that the courts have generally proceeded according to this line of reasoning, but it may be observed that, with rare exception, they have for one reason or another, and even sometimes without giving any reason, reached results in full harmony with the theory here asserted.

To discuss the rationale of actions by parents for injuries to their minor children would extend this article unduly. It may be said in general terms that if the parent has made a contract hiring his child to the master, that contract will tend to fix, as between them, the *prima facie* liabilities.

[37]Cf. Wood, Master and Servant §§ 35, 36; and see note 32, *supra*.

assume. Conspicuous among these is the case of a servant charged with the duty of inspection. The general doctrine is that it is a breach of the master's duty toward the servant if the former fails to exercise reasonable care in inspecting the machinery, and that the servant may without imputation of contributory negligence, rely to a considerable extent upon the master's performing this duty faithfully.[38] Primarily, the servant has not assumed the risk of those dangers of which both he and the master are, in point of fact, ignorant, but which the master might have discovered by a reasonable inspection; and to infer such an assumption of risk on his part, in ordinary cases, would be unreasonable. But as to one employed as an inspector the case is different. His business is that of inspecting for hidden defects. He seeks and contracts for work of that nature. It is, therefore, wholly reasonable to imply as a condition of the contract between him and his master that he will assume the risk of hidden and unknown dangers.[39]

However, inspection is the business of seeking for unknown dangers and not for those that are known. Therefore, when one accepts employment as an inspector he assumes the risk of the dangers unknown to the master; but certainly it is never in contemplation of the contracting parties that the one will set a trap for the other, or that the master will expose the inspector, unwarned, to a hidden danger of which the master has actual knowledge and of which the inspector is ignorant; hence, one employed as an inspector does not assume the risk of injury from exposure to latent dangers of which he is unaware and of which the master has information.[40] The inspector's case is a striking exemplification of the maxim of master and servant law, that "it must appear that the servant injured did not know and had not equal means [as compared with those of the master] of knowing." [41]

[38]This principle will be discussed at somewhat greater length further on in this article.

[39]Lucas *v.* Southern Ry. Co. (1907) 1 Ga. App. 810, 57 S. E. 1041: "Where one contracts to undertake this duty of inspection, he necessarily knows, that there would be no need for his services if dangers were not probable; that he himself is employed for the very purpose of ferreting out these dangers, both latent and patent; and that if he properly discharges his duty he will be the first person to know of these dangers. He therefore usually has equal means with the master of knowing of every danger incident to his duties. Consequently if, in making the inspection, he is injured by a latent danger, he has but encountered the risk which he assumed as a part of his employment, and the master is not liable."

[40]Lucas *v.* Southern Ry. Co., *supra.*

[41]This is the real holding in the case of Priestley *v.* Fowler, *supra.* While that case is frequently cited as the earliest authority on many of the leading principles of the law of the master's liability to his servant for in-

Upon conditions similar to those applying in the cases of inspectors,[42] servants employed to remedy defects in machinery are held to assume the risk of all dangers incident to the doing of that work, notwithstanding the defective conditions may be traceable to antecedent neglect on the employer's part. The reason for the implication of this assumption of risk is palpable. An analogous assumption arising under another branch of contract law is pointed out by Chief Justice Bleckley in the case of *Dartmouth Spinning Co.* v. *Achord.*[43]

Considerations Arising from the Fact that the Relation Is Continuous.

The discussion so far has proceeded for the most part as if the reciprocal duties of the master and the servant were to be executed and performed as of the immediate time of the making of the contract or of the beginning of the work. But usually a continuing relationship with shifting exigencies is contemplated; it is not generally a matter of the single servant performing a single piece of work at once and unaided. This brings within the actual or the implied contemplation of the parties a system of work, the presence and activities of fellow workmen, the introduction of new instrumentalities, the changes that are likely to take place in the condition of the places of work, the instrumentalities, etc., and the

juries, the question then directly before the court was whether the declaration, which failed to allege that the master had knowledge of the dangerous condition (the overloading of the van) and that the plaintiff was ignorant of it, was sufficient as against a motion in arrest of judgment. The case is thus distinguished in Mellors *v.* Shaw (1861) 1 B. & S. 437.

[42]Cf. Green *v.* Babcock Co. (1908) 130 Ga. 469.

[43](1889) 84 Ga. 14, 16. He said: "While it is the duty of the master to furnish his servant safe machinery for use, he is under no duty to furnish his machinist with safe machinery to be repaired, or to keep it safe whilst repairs are in progress. Precisely because it is unsafe for use, repairs are often necessary. The physician might as well insist on having a well patient to be treated and cured, as the machinist to have sound and safe machinery to be repaired. The plaintiff was called to this machinery as infirm, not as whole. An important part of his business was to diagnose the case and discover what was the matter. If he failed in this branch of his profession, it was either his fault or his misfortune. So far as appears, no one knew more of the state and condition of the machinery at the time than he did; and the object of calling him in the room was, that he might ascertain the cause of the trouble and apply the remedy. * * * The incompetency and inattention of the others gave him more to do in his vocation, somewhat as a sickly climate favors a physician's practice. It is to the interest of those who use machinery for it always to be in good condition, but for it to fail often and get out of order is advantageous to the man whose business it is to make repairs. True it is, that the risk of concealed dangers incident to the work of making repairs, is upon him; but as the skilled machinist is best competent to discover and avert such dangers, he is the proper man to incur the hazard."

concomitant changes in the nature of the risks to be encountered. The courts must, therefore, in construing the contract and in raising implications from it and in defining, limiting and outlining duties, assumptions, liabilities and exemptions from it, keep in mind this feature of the relationship; but the general principles outlined above will, and in the nature of things should be, in the main, applicable and controlling.

System of Work.

It is a fair and reasonable implication of the contract that the master will maintain throughout the relationship, a system of work; and it follows from the general duty of every man not to expose his neighbor to dangers unreasonably that it becomes the master's duty to exercise ordinary care to maintain a reasonably safe system of work.[44] What concrete activities on the master's part will satisfy this requirement depends on whether the work is simple or complex or involves the presence and co-operation of a large number of men so situated that individual action on their respective parts would render the doing of the work unsafe unless there were a system.[45] To state it more specifically, he must furnish such an adequacy of tools, workmen, foremen, and must adopt and enforce such rules, signals, (formulated generally or communicated as each exigency shall arise) as that the persons working shall not be unreasonably exposed to dangers. This general duty is recognized by the courts with practical unanimity; to note the diversity of opinion expressed as to its applicability to particular cases would extend this article to too great a length.

Master's Duty to Employ Only Competent Servants.

Of course, it is implied that the master shall hire the fellow servants; it would be unreasonable to presume that the servant should have any power of dictation in this respect. It is reasonable for him to expect that the master will show common prudence in that he will be careful to hire only competent men. Hence, the law so construes the contract, and raises against the master the duty of exercising ordinary care to see that only competent workmen are employed and that those who prove incompetent shall be discharged. The courts are in such unanimity on this question that no further elaboration would be appropriate.

[44]Sword *v.* Cameron, 1 Dunl., B. & M. 135 cited and distinguished in Barton's Hill Coal Co. *v.* Reid (1858) 4 Jur. (N. S.) 767, 770.

[45]McDuffie *v.* Ocean Steamship Co. (1908) 5 Ga. App. 125, 62 S. E. 1008, a case strikingly similar in general principles to that of Sword *v.* Cameron, *supra.*

The Introduction of New Appliances.

As in the furnishing of the original appliances, so in the introduction of new ones, the master must use ordinary care to see that they present no hidden, undisclosed dangers. This rests palpably on the consideration already discussed.

The Duty of Inspection.

Changes in the condition of the place of work and of the instrumentalities are to be expected. The shifting exigencies of almost every business present from time to time new dangers. It is agreed that the master must not knowingly and unreasonably expose his servant to dangers.[46] Is it to be implied, then, that he will keep his eyes shut to escape knowledge as to the changes occurring from time to time or that he will exercise himself to find them out? The question was sententiously answered years ago by an English judge:[47] "And if a master's personal knowledge of defects in his machinery be necessary to his liability, the more the master neglects his business and abandons it to others, the less he will be liable." Hence, the courts are agreed that the contract of employment imposes on the master the continuing duty of making reasonable inspections; and in determining his liability in a given case all the knowledge which reasonable inspection would have disclosed is imputed to him.

Master's Duty To Instruct and Warn.

Again: If the servant is inexperienced, either generally or as to some particular phase of the work, or as to the use of the instrumentalities furnished him, it is natural to imply that the master undertakes to instruct him; otherwise, the very thing in contemplation of the parties, the doing of the work, could not be executed properly and safely. If there are defects or dangers known to the master, either as a result of the inspection or otherwise, and not likely to be seen or comprehended by the servant, fair play dictates that these should be disclosed by the one to the other; and an undertaking on the master's part to that effect is therefore implied, and the correlative duty is imposed upon him.

THE EMPLOYER'S ASSUMPTION OF SKILL.

Further: In legal contemplation, every man who carries on a business warrants to those who are interested in the safe conduct

[46]This is an implication of his (the master's) contract. Railroad Co. *v.* Fort (1874) 17 Wall. 553, 559.

[47]Byles, J. in Holmes *v.* Clarke (1862) 31 L. J. C. L. (N. S.) 356.

of that business that he possesses the requisite skill and experience to enable him to conduct the business prudently. As to this, the law has a standard which does not vary with the actual capacity of the particular proprietor. This is frequently referred to in legal terminology as the "assumption of skill." "If he fails, it is no excuse that he did the best he, being unskilled, actually could. He must be reasonably skilled at his peril."[48]

THE CONTINUOUS, ABSOLUTE, NON-DELEGABLE DUTIES OF THE MASTER.

It follows from the preceding propositions that the relation arising from the contract of employment imposes on the master the continuous duty of using the skill and diligence which one engaged in his occupation should possess,[49] in establishing and maintaining a safe system of work, in engaging competent servants and superior employees to do the work and in discharging those that are incompetent, in furnishing and maintaining the places and instrumentalities of work, and in discovering and remedying defects, and in instructing and warning his servants of dangers of which they are ignorant or which they could not normally comprehend. This states succinctly and briefly, in a general way, though not wholly exhaustively, what is called the absolute, continuous, (and as shall be seen later, non-delegable) duties of the master to the servant.[50]

However, if we were to assume that a breach of any of these duties would be unconditionally an act of personal negligence on the part of the master toward the servant, we could not follow to its logical end the statement frequently found in cases, early and late, that the master is always responsible to the servant for personal negligence, without doing violence to other principles equally well established. These duties of the master may in a fair sense be said to be *prima facie* only. They may be narrowed by the circumstances of the case; and frequently one of these circumstances is that, under the contract underlying the relationship, the servant himself has assumed the risk as to more or less of what would ordinarily rest upon the master.[51]

[48]Pollock, Torts (8 ed.) 29; see also *id.* 530.

[49]Cf. Labatt, Master and Servant §§ 140, 141.

[50]Cf. Moore *v.* Dublin Cotton Mills (1907) 127 Ga. 609, 614.

[51]It is submitted, however, that the doctrines which define the extent of the servant's right to recover are not "the result of a *compromise* between the principle that a servant agrees to assume all the risks incident to the work undertaken by him, and the principle that a master is answerable for

ASSUMPTION OF RISK AS A CONTINUOUS PREDICAMENT.

As the element of the contemplated continuousness of the relationship affects the master's duty, so it also affects the assumptions of the servant. What has been said as to the servant's assumption of risk arising from his conscious acceptance of defective instrumentalities should cover the point that he agrees to take this risk as a continuous condition unless something later intervenes to change the contract.

But say a machine or other instrumentality is safe when furnished and while the work goes on it becomes defective and dangerous. The servant becomes aware of this condition. The master fails or refuses to remedy it. What then? The servant may quit and sue the master for a breach of the contract of employment, if his term of service has not expired.[52] But the privilege of continuing the work notwithstanding the newly arisen danger may appeal to him more strongly than does his right to quit; and he continues to work. What then? A mutual temporary disregard of the terms of the original contract has occurred. In such cases a quasi-new agreement is implied and neither party can insist upon the terms of the original contract which have been departed from until the one has given notice to the other that he will thereafter insist upon performance according to the original agreement. And this, of course, is squarely in accordance with

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the consequence of any negligent acts committed by himself or his agents." There is no such an antinomy as to create a case of compromise; for the word "compromise" indicates a surrender of something by one side in exchange for a surrender of something else by the other. The resultant doctrines present a composite of principles of tort and principles of contract, it is true; but no compromise. The doctrine of the river's flow is not a compromise of the principle that water seeks the way of least resistance and the principle that banks of earth make a confining channel. Without the principle of the water's activity, without the principle of the resistance of the banks, the orderly flow of the current would not result, and the waters might flow broadly over the land; yet, a river is a natural, not an artificial phenomenon. So, too, the doctrines under discussion are a natural flow of the law—the stream of negligence, which, otherwise, might spread more broadly is merely confined to a channel by the restraints of the contract. The quotation above is taken from Section 1 of Labatt's Master and Servant; and it is only fair to the eminent author to say that he prefaces his language with the limitation, "broadly speaking," and that it is manifest from a further perusal of his work that he does not use the word "compromise" in the sense here taken. Cf. Brown *v.* Rome Foundry Co. (1908) 5 Ga. App. 153, 62 S. E. 725.

[52]Wood, Master and Servant 285; Priestley *v.* Fowler (1837) 7 L. J. C. L. (N. S.) 42; Leary *v.* Boston, etc. R. Co. (1885) 139 Mass. 580.

a well established principle of contract law.[53] Hence, except in cases of protest by the servant and promise by the master to repair or to remove the danger (*i. e.*, notice from the one to the other that the terms of the original contract will be insisted upon), the servant by continuing to work in the face of a known hazard, arising during the employment, assumes the risk of injury from that source, and the correlative duties and liabilities of the parties become adjusted accordingly.

CONSTRUCTIVE KNOWLEDGE IMPUTABLE TO THE SERVANT.

Again: Reference has been previously had to the proposition that one who engages in a calling warrants that he possesses the skill common to those engaged in that calling. This doctrine applies to the vocation of laboring.[54] However, there are so many classes of laborers, (plain unskilled workmen, experienced but low-grade servants, skilled laborers, expert artisans, etc.,) that the law has not fixed a standard of skill in this business, as it has in many other callings. Hence, in determining the amount of skill to be expected of a servant, and impliedly warranted by him to his master as part of the contract of employment, the surrounding circumstances, the character of work undertaken, the rate of wages proposed, the servant's age, experience, education, especially so far as they are known to the master, must be taken into consideration.[55] The servant, therefore, agrees to be skillful, subject to the conditions stated; further he agrees to be diligent—diligent not only in doing the work, but in familiarizing himself with the instrumentalities and in protecting himself from dangers. As these things are naturally to be expected of every employee, it becomes an implied term of the contract, and a duty. Whatever knowledge and information would come to him if he faithfully performed this duty is imputed to him whether he performs it or not.

As a composite resulting from the elements analyzed and discussed in the immediately preceding paragraphs is deduced the general principle almost universally applied in this branch of the

[53]Wharton, Contracts § 870. The Civil Code of Georgia (1895) presents this principle, as adapted from the common law, in the following language: "§3642. *Mutual temporary disregard of contract.* Where parties, in the course of the execution of a contract, depart from its terms and pay or receive money under such departure, before either can recover for failure to pursue the letter of the agreement, reasonable notice must be given the other of intention to rely on the exact terms of the agreement. Until such notice, the departure is a *quasi* new agreement."

[54]Wood, Master and Servant § 155.

[55]*Ibid.*

law that the servant assumes the risk of all the dangers incident to the employment, so far as known to him, or so far as he might, by the exercise of ordinary diligence and the skill fairly imputable to him, have discovered. This is his contract; this is his assumption of risk; this is the chief element that operates to narrow the master's *prima facie* duty. Wherever the reason extends, the rule should and does extend; whenever the reason fails in whole or in part because of incapacity to contract, because of warranties and assurances on the master's part which should naturally have the effect of negativing the implications, because of repugnance to statute; or because of any other fact which according to the usual canons of contract law should destroy or change the implication—the rule should likewise fail.

LACK OF VOLITION AS AFFECTING ASSUMPTION OF RISK.

As exemplifying the proposition that anything which would ordinarily destroy contractual capacity likewise affects the assumption of risk, attention is called to those cases in which that volition, which is of the essence of every contract was lacking. Convicts, seamen working under compulsion of superior officers, and others laboring involuntarily are held not to assume the risk.[56] So, too, when the effect of the master's negligence is such as to thrust an emergency upon the servant, and he is obliged to act with such haste, or under such other circumstances as to destroy his power to exercise an intelligent choice, no assumption of risk is to be implied.[57]

[56]See the comment on the decision of Simonds *v.* Georgia, etc. Co. (1904) 133 Fed. 776 and the citation of cases in 5 COLUMBIA LAW REVIEW 402. Cf. Poirier *v.* Carroll (1883) 35 La. Ann. 699, where it was held that the servant did not assume the risk because a statute of the State imposed a penalty on him if he quit, and hence his continuing in the service was not voluntary.

[57]Brown *v.* Rome Foundry Co. (1908) 5 Ga. App. 142, 153, 62 S. E. 720. (The plaintiff and two helpers were carrying a heavy ladle of molten iron with the purpose of pouring it into a flask or mould. The master called one of the helpers away. The plaintiff and his remaining fellow workman, with all the load thus suddenly thrust upon them, attempted to rid themselves of it by carrying it on and pouring it into the mould. The ladle became over-balanced and the hot iron was spilled upon the plaintiff. The court held that if the helper had been called away before the plaintiff and the other laborer had lifted the ladle and they had tried to carry it, notwithstanding the inadequacy of help, it would have been a case for the application of the principle of assumption of risk; but that since the helper was called away after the ladle was lifted and while the men were in the act of carrying it—the total distance being only a few feet—the servant was not afforded a reasonable opportunity to choose between putting it down where he was, and going on to the mould, and that therefore he did not assume the risk.)

EXPRESS CONTRACT AS TO ASSUMPTION OF RISK.

Except in so far as statute or public policy forbids, the master and servant may expressly contract that the one or the other shall assume all the risk.[58] How far public policy forbids such contracts is a matter upon which the courts have seriously divided. In most States, statutes now forbid contracts exempting the master from liability for his negligence.

DEFENSES PECULIAR TO ACTIONS FOR TORT.

Notwithstanding the strong influence and control which the contract of employment exercises on the question of the employer's liability, the servant's suit sounds in tort; and the doctrines of that branch of the law are applicable to it. Abstract negligence does not give a cause of action *ex delicto;* the plaintiff must be in the proper juridical position in order to make a successful complaint of the defendant's delinquency. When the master's *prima facie* duty has been discovered and the necessary subtraction has been made therefrom, by reason of a consideration of the servant's assumption of risk, and the resulting duty has been defined, there may be, and frequently are, a number of reasons, discoverable from an application of the principles of the law of torts, why a breach of that duty will not subject the defendant to liability in the particular case. Two of these defenses will be noticed: they are generally referred to as the principles of *"volenti non fit injuria"* and of contributory negligence. Theoretically, at least, the two are distinct; though in actual practice they are, alas, too often confused.[59]

VOLENTI NON FIT INJURIA.

The maxim, *volenti non fit injuria,* is among the very oldest known to our law.[60] It presents a doctrine of wide range of applicability. It is the genus of which many subordinate doctrines

[58]Western & Atlantic R. R. Co. *v.* Bishop (1873) 50 Ga. 465, 471. There was a contract by which the servant expressly assumed all risk of injury, even by the master's own negligence. The court cited the legal maxim, *"Modus et conventio vincunt legem,"* (quoted translatingly in Brown's Legal Maxims, "The form of agreement and the convention of parties overrule the law."), and held that contracts exempting the master are valid except when the negligent act is criminal. This has been changed by statute, however, in the State in which this decision was rendered.

[59]Cf. Labatt, Master and Servant § 371.

[60]Pollock and Maitland, History of English Law (p. 196) is authority for the proposition that this maxim was held in reverence by the legists of England in the time of Edw. I. Lord Watson remarked in Smith *v.* Baker (1891) 60 L. J. (N. S.) Q. B. D. 683, that it was borrowed from the Civil Law, having been applied in Rome chiefly to the case of one who sold himself into a prevailing form of slavery.

represent the species.[61] It merely means that a plaintiff will not be heard to complain of any conduct or omission of another to which he himself was then and there consenting. In determining whether the maxim is to be applied to an action by the servant against the master, the contract may be looked to as evidentiary, but not as controlling. Only in a loose sense is the servant's contractual assumption of risk to be regarded as a phase of the general doctrine expressed by the maxim.

The operative word of the maxim, it has been said, is *"volenti"* —the notion of a free, untrammeled volition runs through it. It refers to concrete and specific, rather than to abstract, consent, so to speak. It states the predicament resulting from the conscious and voluntary exposure of one's self or property to an act or omission which threatened a particular, injurious result which ensued. Mere knowledge on the part of the person injured, that there was a general risk or danger in the situation is not sufficient to make the maxim inapplicable.[62] For instance, one in the crowded streets of a city is exposed to a risk of which he is generally aware; but this does not put him in the juridical attitude of consenting to being run over.[63] Take also the illustration given by Mellish, L. J., in *Woodley* v. *Metropolitan Dist. R. Co.*:[64]

"Suppose this case: A man is employed by a contractor for cleaning the street, to scrape a particular street, and for the space of a fortnight he has the opportunity of observing that a particular hansom cabman drives his cab with extremely little regard for the safety of the men who scrape the street. At the end of a fortnight the man who scrapes the street is negligently run over by the cabman. An action is brought in the county court, and the cabman says in his defense: 'You knew my style of driving, you had seen me drive for a fortnight. I was only driving in my usual style,' 'Yes, but your usual style of driving is a very negligent style, and my having seen you drive for a fortnight has nothing to do with it.' It will not be disputed the scraper of the streets in the case I have just supposed is entitled to maintain his action."[65]

[61]For example: The rule that voluntary payments of money on an illegal consideration cannot be recovered, Buller's N. P. 131, 132; the rule of practice, *"consensus tollet errorem,"* 2 Smith Ch. Pr. 50; the doctrine that one cannot complain of a fraud perpetrated upon him when he, notwithstanding notice or opportunity to protect himself, exposed himself to its consequences.

[62]Samples *v.* Atlanta (1894) 95 Ga. 110, citing approvingly Osborne *v.* London etc. Ry. Co. (1888) L. R. 21 Q. B. D. 220.

[63]The illustration is borrowed from the argument of Lord Halsbury in Smith *v.* Baker [1891] A. C. 325, 336.

[64](1877) L. R. 2 Ex. Div. 384, 394.

[65]Compare the state of facts involved in the case of Northern Pacific R. R. Co. *v.* Mares (1887) 123 U. S. 710.

In the case just stated, the maxim would have been applicable if the street scraper, seeing that the cabman was driving recklessly, had stepped in front of the horse, or had otherwise exposed himself voluntarily to the danger, when it had become more than a general risk. Hence, the proposition of general recognition in master and servant cases, that the defense of *volenti non fit injuria* is not available, unless it appears that the servant had knowledge not only of the defect or delinquency, but also of the nature and extent of the danger and that he exposed himself to it under such circumstances as to show that he was acting voluntarily.[66]

Any fact or circumstance sufficient to put duress upon the servant or to limit his freedom of choice is available to him in avoidance of the defense. In some cases the duress, or lack of opportunity for volition, is so patent as to be cognizable by the court as a matter of law;[67] in others, it is a question upon which the jury should pass;[68] in still others, the servant's will is palpably free[69] and the courts predicate voluntary action.[70]

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[66]An exhaustive collection of cases illustrating and applying this principle is contained in the note by Mr. C. B. Labatt to the case of O'Malley *v.* South Boston Gas Light Co. in 47 L. R. A. 164 *et seq.* See also an article by the same author in 32 Am. L. Rev. 57. See also Burdick, Torts (2 ed.) 79-80.

[67]As in cases of convicts, seamen, minors under fear of corporal punishment. See Chattahoochee Brick Co. *v.* Braswell (1893) 92 Ga. 631; Dalheim *v.* Lemon (1891) 45 Fed. 225; Rothwell *v.* Hutchinson (1886) 13 Sc. Sess. Cas. (Ser. 4) 463; Eldridge *v.* Atlas S. S. Co. (1892) 134 N. Y. 187; Poirier *v.* Carroll (1882) 35 La. Ann. 706; Smith *v.* Steele (1875) L. R. 10 Q. B. 125 (the case of a pilot who, under the law, had no choice but to serve); Wells, etc. Co. *v.* Gortorski (1873) 50 Ill. App. 445.

[68]As when the servant had no means of leaving the building in which she was employed except by going down ice-covered steps. Fitzgerald *v.* Connecticut River etc. Co. (1892) 155 Mass. 155.

[69]As where a servant is offered higher wages and accepts them on the condition that he will confront the danger. "A marked distinction [exists between] the case of one who undertakes dangerous work in the ordinary course of his employment, and one who undertakes extra risk for extra wages. In the latter case he would be properly considered a volunteer, because for a higher rate of remuneration, he undertakes the risk, knowing its nature." *Per* Channell, B. in Britton *v.* Great Western Cotton Co. (1872) L. R. 7 Exch. 130, 138. See also the language of Lord Herschell in Smith *v.* Baker (1891) 60 L. J. Q. B. (N. S.) 683. It is also said that the maxim is undisputedly pertinent where the danger comes about from operations or conditions into the performing or creation of which the servant's own voluntary conduct has entered. See the statements of Lords Halsbury and Watson in Smith *v.* Baker, *supra.* The doctrine was applied in Mellor *v.* Merchants Mfg. Co. (1890) 150 Mass. 362, where, though the defenses of assumption of risk and of contributory negligence were excluded, the maxim was held applicable because it appeared that the servant voluntarily undertook the work not in the line of his duty. Cf. Thomas *v.* Quartermaine (1887) L. R. 18 Q. B. D. 685.

[70]Whether the servant's fear of being discharged or of losing employment is sufficient to create such duress as to prevent the application of the

The servant's knowledge of the conditions,[71] the fact that he did or did not protest,[72] his age,[73] his opportunity for choice, etc., are relevant, but usually not conclusive, circumstances upon the question as to whether he voluntarily encountered the danger. It may be stated upon high authority[74] that a servant is not bound to abandon the duties for which he has been employed at the very first moment he discovers that he is endangered by the negligence of his master, upon peril of having the maxim successfully invoked against him.[75]

One of the chief basal differences between the defenses of assumption of risk and of *volenti non fit injuria,* grows out of the fact that the former arises contractually, and the latter does not. The maxim may be invoked against a plaintiff who has no contractual capacity; for example, a minor, a married woman under common law disabilities. In legal purview, the power to exercise volition is a capacity of lower order than the power to contract. Many persons may effectually choose who cannot contract. In the application of the maxim there is a tendency among the courts to draw analogies from other branches of jurisprudence and to fix upon certain ages, above or below which the requisite capacity for volition will or will not be presumed; but as to this the author-

maxim is an interesting question on which the courts have broadly divided. The views displayed on the question by the advocates of each of the schools of thought by which it has been thoroughly discussed are set forth lucidly in the valuable note found in 47 L. R. A. 187, *et seq.*

[71]"The maxim, be it observed, is not *'scienti non fit injuria,'* but *'volenti.'* It is plain that mere knowledge may not be a conclusive defense. There may be a perception of the existence of danger, without comprehension of the risk." *Per* Bowen, L. J. in Thomas *v.* Quartermaine (1887) L. R. 18 Q. B. D. 685, 696.

"Mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maixm." *Per* Lord Esher in Yarmouth *v.* France (1887) L. R. 19 Q. B. D. 647, 657.

"I am unable to accede to the suggestion that the mere fact of his [the servant's] continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case." *Per* Lord Watson in Smith *v.* Baker (1891) 60 L. J. Q. B. (N. S.) 683, 694.

[72]See 47 L. R. A. 185, note VII (f). See especially the cases of Richmond etc. R. Co. *v.* Norment (1887) 84 Va. 167; Sanders *v.* Barker (1890) 6 Times L. R. 324; Skipp *v.* Eastern etc. Co. (1853) 9 Exch. 223.

[73](Protest and non-age both present). Tagg *v.* McGeorge (1893) 155 Pa. St. 368.

[74]N. P. Ry. Co. *v.* Mares (1887) 123 U. S. 710.

[75]Compare the reasoning of Grantham, J. in Osborne *v.* London etc. Co. (1888) L. R. 21 Q. B. D. 220.

ities are not sufficiently uniform, either in theory or in practice, to authorize the declaration of a general rule.[76]

The courts are also widely divergent upon the question as to whether the defense under the maxim is permissible under employer's liability acts, which directly or by necessary implication, abolish the defense of assumption of risk.[77] It is submitted, however, that it is illogical to consider the abolition of the one defense as destroying the other; for they rest on wholly different basal considerations, and are not identical in theory or in fact.[78]

"Volenti Non Fit Injuria" AND ASSUMPTION OF RISK DISTINGUISHED.

It is deducible that while it is possible (indeed, it is most usual to find it so) that the same state of facts will support both defenses—*volenti non fit injuria* and assumption of risk—yet that, from the standpoint of applicability to classes of persons or classes of cases, the defense under the maxim is the broader, while, from the standpoint of applicability to classes of risks or dangers, the defense of assumption of risk is the more comprehensive.[79]

CONTRIBUTORY NEGLIGENCE.

It will not be necessary to discuss at length the defense of contributory negligence, as applied to suits by the servant against the master. Qualitatively considered, it is the same in these as in all other actions *ex delicto*. If the servant by doing that which an ordinarily prudent man similarly circumstanced would not have done, or by neglecting that which a prudent man would not have neglected, causes or contributes to his own injury, the defense is open to the master, on the same conditions and to the same extent

[76]Cf. Evans *v.* Josephine Mills (1903) 119 Ga. 448.

[77]See note to O'Malley *v.* South Boston Gas Light Co. (1893) 158 Mass. 135, as reported in 47 L. R. A. 161. See also Labatt, Master and Servant § 652 a.

[78]Cf. Mellor *v.* Merchants Mfg. Co. (1890) 150 Mass. 362. See also Burdick, Torts (2 ed.) 83, 84.

[79]Probably the latter portion of this deduction will be made more perspicuous by reiterating that to bring a risk or danger within the purview of the maxim it must appear that the servant not only knew of the defect or delinquency and comprehended the nature and extent thereof, but also voluntarily encountered it; while he may be held to have assumed a risk of which he was ignorant and which he would not have encountered knowingly, but which he could have discovered by the exercise of that skill and diligence which the implications of the contract imposed upon him. It is not contended that the courts are accustomed to observe this distinction; on the other hand, it is conceded that they very frequently ignore it; it is merely submitted that in principle the distinction exists and should be observed.

as it would be to the defendant in any other case of tort. It is true that different courts take different views as to what relation the plaintiff's act or neglect must bear to the injury, before it is to be considered as contributory negligence, and also as to its effect upon a cause of action; but wherever the particular view is established, it applies to all cases of tort; hence, to master and servant cases.

The Distinctness of the Three Defenses.

It may easily be seen that contributory negligence may consist in voluntarily exposing oneself to a danger under such circumstances that a reasonably prudent man would not have encountered it, and that, therefore, the same state of facts may support all three of the defenses (assumption of risk, *volenti non fit injuria* and contributory negligence); but in principle, each defense is distinct from the other two.[80]

Injuries by Fellow Servants.

Up to this point, the case of a servant injured by a fellow servant has been left unnoticed. This pretermission has been intentional. Till now the theme of this article has been to show that generally the doctrines which define the reciprocal liabilities and duties of masters and servants are not unique, but that they are merely familiar principles of general law which the situation of the parties have made particularly applicable; that they are the analogues of other well recognized doctrines running throughout the whole range of jurisprudence. A reduction of the fellow servant doctrine to its basal elements brings no such result—it is essentially an exception.[81]

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[80] If space permitted, it might be profitable to display these differentiations; but it is hoped, that without further elaboration, the reader will be able to catch the nature of the distinctions existing among the defenses and to see that the practice very largely indulged in by the courts of confusing them, is pernicious. As to the difference between assumption of risk and contributory negligence and as to the confusion of them in the decisions, see Labatt, Master and Servant §§ 305, 306, 309 and cases cited in the notes. For the distinction between the defenses, contributory negligence and *volenti non fit injuria,* see Labatt, Master and Servant § 371; and also 32 Am. L. Rev. 59.

"Carelessness is not the same thing as intelligent choice." Bowen, L. J., in Thomas *v.* Quartermaine (1887) L. R. 18 Q. B. D. 685, 698.

"Acquiescence with knowledge is not synonymous with contributory negligence." Hesse *v.* Railroad Co. (1898) 58 Ohio St. 167, 169.

[81] The criticism of the doctrine by a learned writer is even more severe: "Indeed, the condition of the employee suing his master because of injuries [inflicted by a fellow servant] is an anomaly in our law, and cannot be maintained upon any principle of logic in our jurisprudence without importing some fact or assuming some element to exist contrary alike to justice and public policy." E. B. Goodsell in 23 Alb. L. J. 245, 248.

THE GENERAL RULE OF *"Respondeat Superior."*

Prior to 1837, when the case of *Priestley* v. *Fowler* was decided, and also, of course, prior to 1841 and 1842, the years in which *Murray* v. *South Carolina R. Co.* and *Farwell* v. *Boston R. Corp.* were decided, the doctrine of *respondeat superior* had become well established by the common-law courts. Whether the doctrine which declares the master responsible for the acts of his servant within the scope of the employment, is, as asserted by Mr. Justice Holmes,[82] a survival of an ancient fiction that there was an "identification" between the head of the family and his household, including servants; or whether, as seems to be the more generally accepted opinion,[83] it was developed by insensible gradations out of the notion of one's responsibility for that which another does by one's command, it was a fully developed and well recognized common law doctrine at the time the earliest fellow servant cases were decided. It should be kept in mind, however, that it is almost universally agreed that the holding of the master responsible for acts not expressly commanded, but done in the course of the employment, is the result of a rule resting largely on the dictates of expediency.[84] The doctrine rec-

"I can conceive some reasons for exempting the employer from liability altogether; but not one for exempting him only when those who act for him injure one of themselves. It rather seems to me that these are the very persons who have the strongest claim upon him for reparation, because they incur danger on his account." *Per* Lord Cockburn in Dixon *v.* Rankin (1852) 14 Dunlap 416.

[82] 4 Harv. L. Rev. 345.

[83] "Responsibility for Tortious Acts" by Prof. Wigmore, 7 Harv. L. Rev. 383. On p. 404, note 2, of this article the views of Justice Holmes are criticized. See also Burdick, Torts (2 ed.) 130, 131.

[84] Blackstone advances the two reasons: "Without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable *convenience.*" "The reason of this is still uniform and the same,—that the wrong done by the servant is looked upon in the law as the wrong of the master himself; and it is a standing maxim that no man shall be allowed to make any advantage of his own wrong."

In Hern *v.* Nichols (1709) 1 Salk. 289, Chief Justice Holt, who largely participated in settling the doctrine and in formulating it into its usually recognized terminology, advanced the view that the master was liable under the doctrine that when one of two innocent persons must suffer by the act of a third person, he must suffer who put it in the power of that person to commit the wrong. He says also in Sir Robert Wayland's Case, 3 Salk. 234, "The master at his peril ought to take care what servants he employs, and it is more reasonable that he should suffer for the cheats of his servant than strangers and tradesmen."

"I am liable for what is done for me and under my orders by the man I employ, * * * and the reason that I am liable is this, that by employing him, I set the whole thing in motion." *Per* Brougham in Duncan *v.* Findlater (1839) 6 Cl. & F. 894, 910.

ognizes no exoneration of the master upon the ground that he has exercised any amount of care in the selection of the servant; his liability is determinable solely by the servant's conduct and by whether that conduct was wrongful or not.[85]

The Exception as to Fellow Servants.

From this general rule the earliest master and servant cases announced a departure—the master is not to be held liable for the acts of his servant if the person injured is another of his servants engaged in the same common employment. Why this exception to the general rule?[86] Reasons were given at the time the rule was announced; and most of the reasons given were promptly exposed to ridicule by the merciless logic of judicial and other legal critics.[87] But the rule of the exception—the fellow

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"The modern law of employer's liability is based upon the theory that the employer owes a duty to the public to pay compensation for such damage as may arise from the fact that he is carrying on a business." 3 Holdsworth, Hist. of Eng. Law 310.

"The liability of the employer to the public for injuries caused by acts and defaults of his servants is analogous to the duties imposed with various degrees of stringency on the owners of things which are or may be sources of dangers to others." Pollock, Essays in Jurisp. and Eth. 128.

"Should we now-a-days hold masters answerable for the uncommanded torts of their servants, if normally servants were able to pay for the damage that they do? We do not answer this question; for no law, except a fanciful law of nature, has ever been able to ignore the economic stratification of society, while the existence of a large class of men from whom no rights can be had has raised difficult problems for politics and for jurisprudence ever since the days of Aethelstan." Pollock and Maitland, Hist. Eng. Law, Bk. 2, p. 532.

"The maxim *respondeat superior* is adopted * * * from general considerations of policy and security." Shaw, C. J., in Farwell *v.* B. & W. R. R. Corp. (Mass. 1842) 4 Metc. 49.

[85]Cf. Dansey *v.* Richardson (1854) 3 El. & Bl. 144, 161.

[86]The exception is not generally found in the laws of European countries, other than Great Britain. It was determined by the Court of Cassation of France in 1841 that the section of the Civil Code which practically announced the doctrine of *respondeat superior* made the master liable to his servant for an injury inflicted by the negligence of a fellow servant. See 23 Alb. L. J. 247.

[87]In Northwestern Union Packet Co. *v.* McCue (1873) 17 Wall. 508, 514, the court said: "The defense [of common employment] at best is a narrow one, and in our opinion more technical than just." In the arguments of Messrs. Carpenter and Laken, of counsel for the defendants in error in the case just cited, appears the following striking language: "The better opinion of some of our most enlightened jurists of the present day appears to be strongly against this rule as being founded in neither justice, reason or common sense, and in many cases working gross injustice; and any decision which limits or qualifies it in any way, even in those States which have adhered to it, is welcomed by the profession generally, both bench and bar." See also Crispin *v.* Babitt (1880) 81 N. Y. 516.

servant rule—promptly gained and has tenaciously held (except where statute has intervened) a standing as firm and as universally recognized as any doctrine known to our jurisprudence.[88] There must have been a foundation of reason which appealed to judicial intuition, even if it was not perfectly discovered or was imperfectly announced.

The suggested reason that it is one of the implications of the contract of employment that the servant will assume the risk of the negligence of fellow servants[89] is easily answered by the counter suggestion that lack of contractual capacity on the servant's part does not prevent the operation of the rule.[90] The suggestion that the wage paid the servant includes a compensation to him for exempting the master from his ordinary responsibility for the conduct of the fellow servant[91] has been met by the counter proposition that in point of fact wages are fixed by the law of supply and demand and not upon any basis of risks encountered; and further, that the same line of reasoning would apply with equal plausibility to the transactions between carriers and passengers, bailees and bailors, innkeepers and guests and to all other relationships in which one person contracts with another knowing that the *res* of the contract is to be performed not by the latter

[88]"Then in Priestley *v.* Fowler an exception was engrafted upon that rule—an exception which has not always commended itself to the conscience of mankind, but which is now the undoubted law of the land." *Per* Rigby, L. J., in Groves *v.* Wimborne (1878) L. R. 2 Q. B. D. 402.

[89]See opinions of Evans, J., and Johnson, Chancellor, in Murray *v.* S. C. R. Co. (1841) 1 McMullan's Law, 385.

"But this [the general principle of *respondeat superior*] does not apply to the case of a servant bringing his action against his own employer * * * where all such risks and perils as the employer and servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law must be presumed to be thus regulated." Farwell *v.* B. & W. R. R. Corp. (Mass. 1842) 4 Metc. 49, 56.

[90]King *v.* Boston etc. Corp (1851) 6 Bush. 112; Fisk *v.* C. P. R. R. Co. (1887) 72 Cal. 38, 42; Evans *v.* Josephine Mills (1904) 119 Ga. 449, 453 (all cases of infants); Olson *v.* Clyde (N. Y. 1884) 32 Hun. 425, 428 (a case of an involuntary seaman).

[91]"He was to be paid for his labor, and for the perils to which he was exposed, as incident to his employment. No prudent man would engage in any perilous employment, unless seduced by greater wages than he could earn in a pursuit unattended by any unusual danger." *Per* Johnson, Chancellor, in Murray *v.* S. C. R. R. Co., *supra.*

"They are perils incident to the service and which can be as distinctly foreseen and provided for in the rate of compensation as any others." Shaw, C. J., in Farwell *v.* Boston etc. Corp., *supra.*

See also Fifield *v.* Northern R. Co. (1860) 42 N. H. 225; Mobile etc. R. Co. *v.* Smith (1877) 59 Ala. 245; Chicago etc. R. Co. *v.* Harney (1867) 28 Ind. 28, 30; Roswell *v.* Barnhart (1895) 96 Ga. 521.

personally but through the medium of servants.[92] Certainly the attempt to bring the case within the purview of the maxim, *volenti non fit injuria*,[93] is a palpable perversion of the letter and spirit of the maxim; for the rule extends to cases where the injury has been occasioned by the negligence of a fellow servant of whose very existence the plaintiff was unaware. The other two arguments, much stressed in the early cases, the one, that to allow the servant to recover for the negligence of fellow servants would make employees more careless;[94] the other, that to subject masters to such a liability would deter investors from putting capital into industrial enterprises—have been refuted by the *a priori* demonstration afforded by the experience of those States in which the defense of fellow service has been abolished.[95] The rule extends to all fellow servants of the same master in the same common employment, and proximity of presence is not an element; hence, the argument that the rule is justified by "the policy of making

[92]"The test is not whether the party complaining is paid to undertake the risk. A guest is in the same position as a servant, because he has the means of judging the character of the house in which he is." Pollock, C. B., in Abraham *v.* Reynolds (1860) 5 Hurlst. & N. 143, 146.

"The contract of hiring of labor is an agreement to do certain duties or work for a consideration called wages,—*i. e.*, a compensation for services—nor does the word wages in any way extend or include the idea of a premium for the risk which the workman runs. The contract contains not the slightest essence of the law of insurance. * * * The complexity and variety of modern mechanism, the extent and gigantic proportions of manufacturies * * * or even of a single railway render it impracticable, not to say impossible, that a new man should be so informed that he might know his danger and calculate his risks. * * * With these vital elements of the law of insurance ignored, to say that the employee received a premium for the risk he assumes is as erroneous and false as to say that he receives higher pay because of danger he incurs. Wages as a rule are regulated by the law of demand and supply; and it cannot be denied that the test of high or low wages depends not upon the danger incurred but upon the responsibility imposed, and instead of the persons in most hazardous occupations receiving the highest wages, the contrary is true, viz.: the person in the safest situation has as a rule the highest salary. * * * A traveler knows the dangers incident to a railway journey [including the risk of the carrier's servants being negligent] but that fact does not preclude him from recovering as a passenger even if he rides on a free pass." 23 Alb. L. J. 245, 247.

[93]Lord Justice Williams in Groves *v.* Wimborne [1898] 2 Q. B. 402, 417: "I do not care whether the view of Lord Abinger, C. B., in *Priestley* v. *Fowler* be taken, and the defense be based on the maxim 'Volenti non fit injuria,' or the view expressed in later cases be taken. * * * In either case, the defence seems to me to be a defence," etc.

[94]For a doubt expressed by the Massachusetts court as to the validity of this alleged reason see Gannon *v.* Housatonic R. Co. (1873) 112 Mass. 234.

[95]See the full discussion of this question in Labatt, Master and Servant § 475.

each servant interested in the good conduct of the rest"[96] was repudiated in the early Massachusetts case,[97] and has generally been disregarded where advanced.[98]

In fine, the enlightened legal criticism of England and America has about reduced the reasons upon which the master's exemption from liability in this class of cases exists to this: The doctrine of *respondeat superior* is a doctrine itself based largely on expediency, rather than upon any great principle of natural justice; industrial conditions at the time it became necessary for the courts to formulate a rule of liability touching injuries to a servant by one of his master's other workmen were such as to make it inexpedient to extend the general rule to that relationship; hence, an exception was declared.[99] As the times have changed and industrial conditions have become different, and the argument of expediency no longer seems so valid, the courts through judicial pertinacity have held on to the rule, but they have developed many limitations which the courts that dealt with the question in the early days would probably have never admitted.

A Rationale Proposed.

It is submitted that judicial intuition is now shaping the doctrine so as to rest it on a reason hinted at but not greatly enlarged upon in the earliest American case[100]—that the fellow servant as to whose conduct the master is exempt is not his (the master's) agent alone, but is also an agent of the servant himself.[101]

The courts are now generally well committed to the doctrine that the master is responsible to his servant for the negligence of a fellow servant in the performance of what are called the personal, absolute, or non-delegable[102] duties of the master, but is

[96]Cooper *v.* Mullins (1860) 30 Ga. 146.

[97]Farwell *v.* Boston R. Corp., *supra.*

[98]Compare the following Georgia cases: Scudder *v.* Woodbridge (1846) 1 Ga. 195; Cooper *v.* Mullins, *supra;* Brush Electric Co. *v.* Wells (1899) 110 Ga. 192, 196.

[99]"Like the main rule, this exception is founded upon public policy." Sullivan *v.* Mississippi etc. R. Co. (1860) 11 Iowa 421.

[100]Murray *v.* S. C. R. R. Co., *supra.*

[101]"It is equally as well established that where a number of persons contract to perform service for another * * * and one receives an injury by the neglect of another in the discharge of this duty, they are regarded as substantially the agents of each other, and no recovery can be had against the employer." Louisville, etc. R. R. Co. *v.* Cavens (Ky. 1873) 9 Bush 559, 565.

[102]The word "non-delegable" is not apt in this connection. The performance of the master's personal duties is delegable—in cases of corporations, necessarily so; though the delegation does not shift the responsibility.

not responsible for the negligence of a fellow servant engaged in the duty of helping the servant carry on the execution of the work.[103] Previously, in this article, attention was called to the fact that the contract of employment related to a business in which each of the contracting parties had somewhat of a proprietorship; the master's business being that of carrying on the enterprise in question, the servant's that of laboring in that enterprise. The servant's business,—the execution of the work, would be inefficiently done but for his ability to secure the co-operation of certain conscious animate agencies,—fellow servants, in fine, (just as he must procure the tools and inanimate instrumentalities); and the nature of the relationship is such that the master must furnish the animate as well as the inanimate agencies; but, in an appreciable sense, it may be seen, the tools, the fellow servants, all the instrumentalities by which the work is executed, are the agencies of the servant, necessary to his business as a laborer. Of course, as the furnisher of these agencies, the master must use ordinary care and diligence to see that the animate are competent and that the inanimate are not defective. But when it comes to the question of absolute responsibility for the conduct of a conscious agent, the principle of *respondeat superior* rests not so much upon the circumstance that the principal contractually employed the agent, as upon the physical fact that the agent was acting in the scope of a business being performed for him who was the proprietor of the business.[104] In this sense, the fellow workmen while engaged in co-operating with the servant in executing the details of the labor are agents acting in the scope of their employment and in furtherance of the servant's business;—and to this extent the negligence of the fellow servant is to be imputed to the servant as well as the master.[105] Without saying that the theory here presented is altogether valid, or that it rests on more than mere plausibility, it is submitted that it is in accord with the

[103]There is an admirable and lengthy collection of cases illustrating this proposition in the note to § 550 of Labatt, Master and Servant. There can be but little doubt that Mr. Labatt's admirable treatise has tended greatly to unify the courts upon this proposition. Courts which had previously announced this doctrine more or less inferentially and tentatively now declare it expressly and absolutely. Compare Cheney *v.* Ocean Steamship Co. (1893) 92 Ga. 726, with Moore *v.* Dublin Cotton Mills (1907) 127 Ga. 609, and Dennis *v.* Schofield (1907) 1 Ga. App. 489, 57 S. E. 925.

[104]Compare note 84, *supra.*

[105]Probably this notion influenced the court in Evans *v.* Atlantic etc. R. Co. (1876) 62 Mo. 49, 57, to speak of "the rule that one servant is *responsible for* the negligence of his fellow."

tenor of the more advanced modern judicial opinion and is about the fairest basis upon which the fellow servant doctrine can now rest.

In Conclusion.

The doctrines which declare the reciprocal liabilities and duties of masters and servants are largely outgrowths of the application of broad common law principles to contractual implications and to considerations of expediency. Expediency, even public policy, is essentially a matter for legislative declaration;[106] the implications to be drawn from contracts should be in accordance with the law and change readily as the law changes; hence, not only is it competent for law-making bodies to pass statutes making new declarations of expediency or public policy, and enlarging or diminishing the implications to be drawn from contracts of employment, or even forbidding the making of express stipulations as to such things as negligence; but statutes so passed are not to be considered as uprooting any great common law doctrine or principles of natural justice, but rather as changing the conditions on which these fundamentals of common law and natural justice are to operate.[107]

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[106]Cleland *v.* Waters (1855) 19 Ga. 35; Enders *v.* Enders (1894) 164 Pa. St. 266; Vidal *v.* Mayor etc. of Philadelphia (1844) 2 How. 127, 198, 199; U. S. *v.* Trans-Missouri Asso. (1893) 58 Fed. 58, 69; Smith *v.* Du Bose (1887) 78 Ga. 413, 440.

[107]If the conclusions asserted in this article are not specious, the refusal of the Supreme Court of Connecticut to give recognition to the Federal Employers' Liability Act (assuming it to be constitutional, as to which no opinion is here expressed,) seems founded on no sufficient ground. See Hoxie *v.* New York, etc. R. Co. (Conn. 1909) 73 Atl. 754.